RE ALI HASSAN
EX P HSBC BANK MALAYSIA BHD

HIGH COURT MALAYA, KUALA TERENGGANU
NIK HASHIM J
[BANKRUPTCY NO: 29-667-2000]
16 MARCH 2003

BANKRUPTCY: *Notice - Validity of notice - Claim for arrears of interest on judgment debt - Whether time-barred - Whether notice filed after six years rendered invalid - Limitation Act 1953, s. 6(3)*

LIMITATION: *Interest - Judgment debt - Act of recovery - Whether act of recovery must be made within six years of judgment date - Limitation Act 1953, s. 6(3)*

CIVIL PROCEDURE: *Interest - Judgment debt - Act of recovery - Whether act of recovery must be made within six years of judgment date - Limitation Act 1953, s. 6(3)*

The judgment creditor ('JC') filed a bankruptcy notice ('BN') against the judgment debtor ('JD') on 15 August 2000 based on a consent judgment recorded between the parties on 14 December 1990. In the BN, the JC claimed the judgment sum, interest thereon for a period of six years and deductions for payments made. The JD applied to set aside the BN but the senior assistant registrar dismissed the application. The JD appealed to this court on the grounds that the BN was invalid as it had included arrears of interest that were not recoverable. This was because the BN was not filed within six years of the judgment date pursuant to the second limb of s. 6(3) of the Limitation Act 1953 ('the Act'). The case of *United Malayan Banking Corporation Bhd v. Ernest Cheong Yin* was cited in support thereof. The JC argued that the BN was valid as long as it was filed within 12 years of the judgment date pursuant to the first limb of s. 6(3) of the Act.

The issue was whether the first limb or the second limb of s. 6(3) of the Act was applicable.

Held:

[1] The first limb of s. 6(3) of the Act was not applicable in the present case. The applicable provision was the second limb of the section. The first limb was in respect of enforcement and by relying on s. 2 of the Act as to the interpretation of the word "action" to include "other proceeding in court",

the bankruptcy proceedings are not enforcement proceedings but an action on judgment commenced by way of bankruptcy proceedings. The JC could by all means enforce the judgment before the expiry of 12 years from the date of judgment. The JD was not challenging that but only the inclusion of the arrears of interest that had been filed after the period of six years from the date of the judgment in bankruptcy. The Federal Court in *Ernest Cheong* ruled that the act of recovery of interest in respect of the judgment debt must be made within 6 years of the judgment date and only up to the date of recovery. Although the JC herein had limited the arrears of interest to only 6 years from the judgment date, the BN was filed on 15 August 2000 long after the limitation period of six years that expired on 13 December 1996. Therefore, the BN was rendered invalid. (p 232 a-e)

[Appeal allowed.]

Case(s) referred to:
Re Abu Bakar PC Kuaya; ex p Navaratnam Sivasamboo (Bankruptcy No: 29-487-2001) (unreported) ***(foll)***
Re Yau Kin Mun; ex p Public Bank Bhd [1999] 3 CLJ 412 ***(not foll)***
United Malayan Banking Corporation Bhd v. Ernest Cheong Yin [2002] 2 CLJ 413 ***(foll)***

Legislation referred to:
Limitation Act 1953, s. 6(3)
Rules of the High Court 1980, O. 46 r. 2(1)(a)

For the judgment debtor - R Sarengapani; M/s Vendargon & Partner
For the judgment creditor - Vignesh Kumar; M/s Balendran Chong & Bodi

Reported by Usha Thiagarajah

JUDGMENT

Nik Hashim J:

The Facts

On 14 December 1990 a consent judgment between the judgment creditor (JC) and the judgment debtor (JD) was recorded. On 31 May 2000 the JC obtained leave of the court to execute the said consent judgment against the JD; this was done in compliance with O. 46 r. 2(1)(a) of the Rules of the High Court 1980. On 15 August 2000 the JC commenced bankruptcy proceedings by requesting for the issuance of a bankruptcy notice (BN). The BN was served on the JD on 16 September 2000. In the BN, the JC claimed: (i) the judgment sum of RM111,021.63, (ii) interest thereon from 16 April 1988 to 15 April

1994 ie, for a period of six years pursuant to the terms of the judgment, (iii) all payments received were taken into account and deducted accordingly. The JD applied to have the BN set aside. On 16 April 2002, the senior assistant registrar (the SAR) dismissed the application. The JD appealed.

The Issue

At the hearing of the appeal before me, it was agreed by both parties that the issue to be considered by the court was:

> Whether the arrears of interest in the BN can be claimed when the BN was issued more than 6 years from the date of the judgment.

The Contentions Of The Parties

Learned counsel for the JD submitted that the BN notice which included the arrears of interest, even though limiting itself for a period of six years only, and which was filed after the period of six years from the date of the judgment is bad in law and ought to be set aside, and cited the second limb of s. 6(3) of the Limitation Act 1953 (the Act) and the Federal Court case of *United Malayan Banking Corporation Bhd v. Ernest Cheong Yin* [2002] 2 CLJ 413 in support.

Learned counsel for the JC, on the other hand, argued that the BN could be filed at anytime after six years but before 12 years from the date when the judgment became enforceable as provided in the first limb of s. 6(3) of the Act, and in support of his argument he relied on the High Court case of *Re Yau Kin Mun; ex p Public Bank Bhd* [1999] 3 CLJ 412, which held that s. 6(3) only prohibits the bringing of any action upon a judgment after the expiration of 12 years.

The Findings Of The Court

In *Ernest Cheong*, the appellant obtained summary judgment against the respondent on 15 October 1987 but the respondent failed to satisfy the judgment sum. The appellant then filed a bankruptcy notice ('BN') against the respondent on 24 January 1996 for the sum of RM229,563.68 including accrued interest. The senior assistant registrar dismissed the respondent's application to set aside the BN. However, the respondent was successful in his appeal to the judge in chambers who held that the BN was invalid as the act of recovery of the arrears of interest therein, with the issuance of the BN on 24 January 1996, was time-barred by virtue of s. 6(3) of the Act. The appellant's appeal to the Court of Appeal was dismissed and hence the appeal to the Federal Court. The question before the Federal Court was whether, in respect of the second limb of s. 6(3) of the Act, no arrears of interest on any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due. Abdul Malek Ahmad FCJ held:

[1] The second limb of s. 6(3) of the Act provides that an action to recover arrears of interest must be brought within six years of the judgment date, and because of the word "arrears", it cannot denote interest which is still not due. It must, therefore, mean arrears of interest at the time of recovery and cannot include future interest even if the amount due has not been paid. Therefore, a person filing an action for recovery of arrears of interest on the last day of the six-year period from the judgment date is only entitled to that amount and nothing more. If he files it on the first day after the six-year period, his action is barred by limitation.

[2] Although the amount of arrears of interest claimed for six years from the judgment date was proper, the BN had been filed on 24 January 1996, long after the limitation period of six years which expired on 14 October 1993. Accordingly, the BN was rendered invalid.

[3] ...

[4] ...

[5] ...

[6] To answer the question posed, in view of the wording of the second limb of s. 6(3) of the Act, the act of recovery of the arrears of interest in respect of the judgment debt must be made within six years of the judgment date and only up to the date of the act of recovery. In the instant case, there was no formal defect or any irregularity and s. 131 of the Bankruptcy Act 1967 was not applicable. The only error of the appellant was to file the BN out of time.

The above case was followed by Kuantan High Court in unreported case of *Re Abu Bakar bin P.C. Kuaya; ex p Navaratnam a/l Sivasamboo, vide* Bankruptcy No. 29-487-2001 where the learned judge Tengku Baharudin Shah on 4 July 2002 held that any claim of arrears of interest (even though limiting to six years) filed after the period of six years from the date of judgment was barred by limitation.

At this juncture, it is pertinent to reproduce s. 6(3) of the Act and it states:

> An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

Whereas 'action' under s. 2 of the Act includes a suit or any other proceeding in a court of law.

The aforesaid provisions are quite clear. Therefore, applying the provisions to the facts, I hold that the first limb of s. 6(3) of the Act is not applicable in the present case. The applicable provision is the second limb of the section. The first limb is in respect of enforcement and by relying on s. 2 of the Act as to the interpretation of the word 'action' to include 'other proceeding in court', the bankruptcy proceedings, in my view, are not enforcement proceedings but an action on judgment commenced by way of bankruptcy proceedings. The JC could by all means enforce the judgment before the expiry of 12 years from the date of the judgment. The JD is not challenging that but only the inclusion of the arrears of interest that had been filed after the period of six years from the date of the judgment in bankruptcy.

With regard to the case law, I agree with the learned counsel for the JD that the facts of the instant case are on all fours with the case of *Ernest Cheong*. As a court that is inferior to the Federal Court, I am bound by the principle of *stare decisis* to accept loyally the decision in *Ernest Cheong*. For that reason, I am unable to follow the decision in *Re Yau Kin Mun* on the issue.

The Federal Court in *Ernest Cheong* ruled that the act of recovery of the arrears of interest in respect of the judgment debt must be made within six years of the judgment date and only up to the date of the act of recovery. The JC here had limited the arrears of interest to only six years from judgment date, but the BN was filed on 15 August 2000, long after the limitation period of six years that expired on 13 December 1996. Therefore, pursuant to the second limb of s. 6(3) of the Act, and following *Ernest Cheong*, I hold that the BN is rendered invalid for being filed out of time. The BN is barred by limitation.

It is to be noted that the Federal Court case of *Ernest Cheong* was not yet reported when the SAR dismissed the JD's application to set aside the BN. Had the SAR been made aware of the Federal Court's decision, I feel sure her decision might well be different as the facts in that case are not distinguishable from the facts in the present appeal.

In the result, the appeal is allowed with costs and the decision of the learned SAR given on 16 April 2002 is hereby set aside, and the JD's application to set aside the BN is therefore allowed as prayed.